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No. 09-378

# In The Supreme Court of the United States

VINCE AKINS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

This case concerns the Government's burden of proof to establish the materiality element of bank fraud under 18 U.S.C. § 1344.

I. Does the Government meet its burden of proof to establish a false statement is "material," by merely showing the false statement is "relevant?"

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## OPINIONS BELOW

Mr. Akins was originally convicted by a jury sitting in the United States District Court for the District of Maryland. He was sentenced by the Honorable Frederick J. Motz. There was no reported opinion, and judgment was entered by the District Court on October 26, 2007. The opinion of the United States Court of Appeals for the Fourth Circuit on direct review of Mr. Akins' conviction is attached in the Appendix at page App. 1.

## JURISDICTION

The Fourth Circuit entered a decision and order affirming Mr. Akins' conviction on June 29, 2009. (App. 1 ). This Court has jurisdiction to review the order of the Fourth Circuit on writ of certiorari pursuant to *28 U.S.C. § 1254(1).*

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

*United States Constitution, Amendment V*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in

cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*18 U.S.C. § 1344*

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

## STATEMENT OF THE CASE

The Government charged Vince Akins with an ongoing scheme in which he allegedly obtained two fraudulent social security numbers, in addition to his original social security number, and used them to obtain driver's licenses, and bank loans. (App. 2). The Indictment, filed April 4, 2006, set forth nine counts. (App. 2). The allegations in counts 1 through 5 pertained to social security fraud, and counts 6 through 9 pertained to bank fraud. (App. 2-3).

After a five-day trial, ending July 23, 2007, the Jury convicted Akins on all counts. On October 26, 2007, Judge Frederick Motz sentenced Akins to 60 months in prison. The same day Akins filed his notice of appeal. (App. 3).

On direct appeal to the U.S. Court of Appeals for the Fourth Circuit, Mr. Akins argued that his convictions on Counts 5-9 should be vacated because the Government never produced sufficient evidence at trial to support the materiality element of bank fraud. (App. 3-6).

The Fourth Circuit had not previously addressed the materiality issue as it was presented in this case. Mr. Akins argued that the Fourth Circuit should follow precedent from the Second and Seventh Circuits, as well as other courts, that was on-point. The Fourth Circuit declined to do so, and

instead affirmed Mr. Akins' conviction by relying on fine-print language contained in a boilerplate paragraph at the end of one of the personal financial statements that Mr. Akins signed. (App. 4). This personal financial statement requested information like name, address, date of birth, social security number, and some basic financial information.

The boilerplate language provided that "the information contained in this statement is provided to induce BB&T to extend or to continue the extension of credit to the undersigned . . . . The undersigned acknowledge[s] and understand[s] that BB&T is relying on the information provided herein in deciding to grant or continue credit or to accept a guaranty thereof." (App. 4). After quoting this passage, the Court concluded that because of what the boilerplate says, any misstatement on the application form is material. In so doing, the Court did not quote the part of the boilerplate that actually addressed misrepresentations, and materiality. The same paragraph in the personal financial statement also stated that, "if any information herein should prove to be inaccurate or incomplete in any material respect, BB&T may . . . ." (J.A. 596) (emphasis added). This unquoted passage recognizes that some incorrect information may not be material, therefore underscoring the inherent difference between relevance and materiality, which is critical to

assessing materiality.

Notwithstanding the language that acknowledged some inaccuracies may not be material, on June 29, 2009, the Fourth Circuit affirmed on this evidence alone, and issued an opinion denying Mr. Akins' requested relief. (App. 1-6).

## BRIEF SUMMARY OF REASONS FOR GRANTING THE WRIT

The primary reason to grant a Writ in this case is to resolve a split between the circuits.

The disputed question of law is what burden of proof the Government must meet to satisfy the materiality element for a Bank Fraud conviction. The interpretation of that element articulated by the Fourth Circuit in this case conflicts with the interpretation previously made by the Second Circuit in *United States v. Rigas*, 490 F.3d 208 (2d Cir. 2007) and the Seventh Circuit in *United States v. Coffman*, 94 F.3d 330 (7th Cir. 1996).

It has been a decade since this Court last addressed this general subject, and confirmed that materiality is an element of Bank Fraud. *Neder v. United States*, 527 U.S. 1 (1999). The Court rejected the idea that a Bank Fraud conviction could stand "so long as the defendant intended to deceive the

victim, even if the particular means chosen turn out to be immaterial." *Neder*, 527 U.S. at 24. Since *Neder* circuit courts have understood the Government must prove materiality, but disagreement has arisen over just how low of a hurdle materiality is.

This circuit dispute is worth the attention of the Court because: (1) it is part of broader confusion among the circuits about what materiality actually means; and (2) the increasing confusion comes at a time, in the aftermath of the lending crisis, when there is greater focus being placed on bank fraud prosecutions.

Essentially, the Fourth Circuit has adopted an approach that automatically counts every piece of information entered on a bank's boilerplate forms as *per se* material. This approach is incorrect because it eviscerates any difference between relevance and materiality, and erodes the burden of proof for materiality required by this Court. The Second Circuit's approach is better. The Second Circuit recognizes that a lender's request for information means the information is relevant, but the simple fact that certain information must be provided does not mean the information is *per se* material.

## REASONS FOR GRANTING THE WRIT

### I. TO RESOLVE THE CIRCUIT SPLIT OVER HOW TO APPLY THE TEST OF "MATERIALITY" IN BANK, MAIL, AND WIRE FRAUD CASES.

#### A. The Circuits Are In Conflict Over What The Government Must Prove In Order To Meet The Materiality Element Of Bank, Wire, And Mail Fraud.

The disjunctive nature of the Bank Fraud statute, which charges two separate offenses that are nonetheless largely overlapping has been a constant source of problems among the federal circuits.[1] *See 18 U.S.C. § 1344.* The confusing

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[1] The materiality split described in this Petition involves the erosion of the burden of proof for materiality below the level required by this Court in *Neder*. Aside from the split between the circuits over materiality that is part of this petition, there is also a split between the circuits concerning the Government's burden of proof on the intent element of bank fraud. This multi-faceted split between the circuits on the intent element, has been briefed to the Court in other petitions seeking a grant of certiorari. *See* Petition for Writ of Certiorari in *Dantone, Inc. v. United States of America*, No. 06-71; Petition for Writ of Certiorari, *Wilson v. United States of America*. No. 03-304.

statute, along with the absence of the term "material," from the bank, wire, and mail fraud statutes, already led numerous circuits to erroneously conclude that materiality was not even an element of bank fraud, before this Court resolved that conflict in *Neder v. United States*, 527 U.S. 1 (1999).

Since *Neder*, there remains great confusion among the circuits over how to apply materiality in the aforementioned criminal frauds, especially in the context of false statements. That confusion stems not only from the disjunctive nature of the bank fraud statute, but also from an inaccurate characterization of *Neder* that has blossomed in several circuits.[2] The mis-characterization is that *Neder* adopted two separate definitions of materiality. *See United States v. Johnson*, 297 F.3d

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These circuit splits, and the Court's decision to previously grant certiorari and address great confusion over the basic elements of bank fraud in *Neder*, exemplifies the confusing nature of the bank fraud statute.

[2] *See United States v. Richards*, 204 F.3d 177, 191 (5th Cir. 2000) (Fifth Circuit applies definition of materiality from footnote 5 of *Neder*); *United States v. Svete*, 556 F.3d 1157, 1164 (11th Cir. 2009) (en banc); *United States v. Benjamin*, 252 F.3d 1, 21 (1st Cir. 2001); *United States Ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 914 n.5 (4th Cir. 2003).

845, 866 (9th Cir. 2001) (discussing these two interpretations).

The Court in *Neder* provided the general definition of materiality consistent with prior precedent. *Neder*, 527 U.S. at 16. However, in a subsequent footnote later in the Opinion of the Court, the Court also cited to the tort definition of materiality from the *Restatement (Second) of Torts* § 538. *Neder*, 527 U.S. at 22 n. 5. The inclusion of that definition has led a growing number of circuits to go beyond the traditional, and general formulation of materiality found in *Neder*, and to instead apply the tort test from the *Restatement*, that was in footnote five. *See Richards*, 204 F.3d at 191; *Svete*, 556 F.3d at 1164; *Benjamin*, 252 F.3d at 21; *Harrison*, 352 F.3d at 914 n.5.

The First, Fourth, Fifth, and Eleventh Circuits have all maintained at some level that *Neder* defined the test of the materiality of false statements in footnote five. Other circuits rely exclusively on *Neder's* main text which defines the term as follows: "a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it is addressed."[3] *Neder*, 527 U.S. at 16.

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[3] *United States v. Pizano*, 421 F.3d 707, 722 (8th Cir. 2005) (citing the traditional *Gaudin* standard of materiality

Still other courts have cited to both parts of *Neder*, with confusion even within the circuit. *Compare*, *United States v. McBane*, 433 F.3d 344, 349 (2005) (3d Cir. 2005) (citing the general *Gaudin* standard from *Neder's* main text, and not referencing the *Restatement's* definition), *with United States ex rel. Cantekin v. University of Pittsburgh,* 192 F.3d 402, 415-16 (3d Cir. 1999) (court noting that *Neder* "quoted from the *Restatement*," for a definition of criminal materiality).

The Second and Seventh Circuits have made the process of assessing materiality straightforward, by explicitly distinguishing materiality from relevance, as the D.C. Circuit also did in *Weinstock v. United States*, 231 F.2d 699 (D.C. Cir. 1956).[4] *See United States v. Rigas*, 490 F.3d 208 (2d Cir. 2007); *United States v. Coffman*, 94 F.3d 330 (7th Cir. 1996) (distinguishing between misrepresentations that are material, as compared to those that are mere

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from the text of the opinion in *Neder*); *United States v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007); *United States v. Fernandez*, 282 F.3d 500, 508 (7th Cir. 2002); *United States v. Klein*, 476 F.3d 111, 113 (2d Cir. 2007).

[4] In *Weinstock*, the D.C. Circuit explained that "to be relevant means to relate to the issue. To be material means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made." *Weinstock*, 231 F.2d at 701.

"puffery").[5] This approach to applying materiality in criminal frauds is most consistent with the Court's prior precedents. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Kungys v. United States*, 485 U.S. 759, 770 (1988).

While no court has expressly rejected the general formulation of materiality in *Neder*, in practice numerous circuits have refused to rely on it and instead have created confusion by adopting the tort definition, which has lead to divergent outcomes. *See, e.g., United States v. Svete*, 556 F.3d 1157, 1165 (11th Cir. 2009) (en banc).[6] Some of these outcomes, like concluding that any intentionally false statement is material, were forecasted by

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[5] The Seventh Circuit held that materiality was an element of bank fraud prior to this Court's decision in *Neder*. *See e.g. Coffman*, 94 F.3d at 335. Since *Neder*, the Seventh Circuit has explained that *Neder* did not change the law in that circuit and subsequent decisions, continue to cite to *Coffman* in reference to materiality. *See Mankarious v. United States*, 282 F.3d 940, 942 (7th Cir. 2002).

[6] In *Svete*, an en banc panel of the Eleventh Circuit held that *Neder* materiality is established as long as the misrepresentation is "objectively reliable." In other words, as long as the lie looks reliable, then materiality is satisfied, even if the lie is about a trivial matter. *Svete*, 556 F.3d at 1165.

Justice Scalia in his dissent from *Neder*.[7]

The divergent circuit court decisions reveal that confusion about the scope of materiality usually arises in the context of circuit courts trying to distinguish "materiality" of a false statement from "reliance" on that false statement. *See, e.g., United States v. Kenrick,* 221 F.3d 19, 32 & n. 16 (1st Cir.

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[7] In *Neder*, there was universal agreement among the Justices that materiality is an element of bank, mail, and wire fraud. However, *Neder* still drew three dissenting Justices, and a concurring opinion by Justice Stevens. The disagreement – which predicted the current conflict among the circuits – related to whether certain false statements would be considered automatically material. *See Neder*, 527 U.S. at 35 n. 2 (Scalia, J., dissenting). Writing in dissent, Justice Scalia took issue with analysis in the Neder decision, which he felt was not valid and which could be watered down to read almost any mis-statement as material. As Justice Scalia wrote:

> If that analysis were valid, we could simply dispense with submitting the materiality issue to the jury in all future tax cases involving understatement of income; a finding of intentional understatement would be a finding of guilt – no matter how insignificant the understatement might be, and no matter whether it was offset by understatement of deductions as well.

*Id.*

2000) (explaining that reliance on a false statement is not required to establish materiality, then using footnote five in *Neder* to define materiality).

One point of confusion *Neder* did settle about applying materiality in criminal frauds is that reliance on a false statement is not required to establish the materiality of the false statement. *Neder*, 527 U.S. at 17. However, numerous circuits enforcing that point are doing so by applying the tort definition of materiality in a misplaced reliance on footnote five. Even more problematic, these circuits are claiming that by including this tort definition in footnote five of *Neder*, this Court somehow adopted that tort definition as the definition of materiality across the spectrum of mail, wire and bank fraud cases, three extremely broad and often prosecuted statutes. *See Harrison*, 352 F.3d at 914 n.5; *Richards*, 204 F.3d at 191; *Svete*, 556 F.3d at 1164; *Benjamin*, 252 F.3d at 21. The tort definition should not be relied upon because this Court never adopted the definition, and the definition inappropriately lowers the burden of proof for criminal materiality. *See*, *infra* § I.C.

The Fourth Circuit, like the Third Circuit, has cited to both definitions in different cases. *See Harrison*, 352 F.3d at 914 n. 5 (tort definition); *United States v. Pasquantino*, 336 F.3d 321 333 (4th

Cir. 2003) (*Gaudin/Kungys* standard). But, panels within the Fourth Circuit have also taken the analysis a step further by concluding that any mistatement on a loan application is *per se* material because the false statement "could have been material." *See United States v. Strassini*, 59 Fed. Appx. 550, 2003 U.S. App. LEXIS 4190 (concluding that because the defendant admitted he submitted false information to obtain bank loans, the false information was material). The Fourth Circuit's erosion of the meaning of materiality in *Neder* is endemic of confusion generated by these dueling definitions, and not having a clear rule to follow. Similar erosion of the burden of proof below the *Neder* standard are occurring in other circuits as well. *See Svete*, 556 F.3d at 1164 (objective reliability is sufficient to prove materiality).

The consequences of this confusion, which are discussed in greater detail in § I.C, below, are serious because at stake in this conflict is not just the breath of the bank fraud statute, but also the breath of the materiality analysis in mail and wire fraud prosecutions. *See Neder*, 527 U.S. at 17 (interpreting these three statutes as containing the same materiality standard). Together these three are the most wide-reaching federal criminal statutes being routinely prosecuted. This materiality conflict goes to the heart of the degree to which these

statutes will protect some of the less prudent members of our society.[8] The circuit split also raises questions of federalism, overzealous prosecution, and due process. It is about how far criminal law should intercede in private transactions between citizens. For these reasons, and others presented below, this conflict is worth the attention of this Court.

### B. The Fourth Circuit's Decision Frames The Conflict Between The Circuits Well Because The Fourth Circuit's Decision Turns On The Difference Between Relevance And Materiality.

By focusing exclusively on fine-print boilerplate tucked into the bottom of a bank's personal financial statement, and concluding that any misrepresentation is automatically material, the

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[8] Circuit courts that have been applying the tort definition of materiality have found themselves in confusing discussions about whether false statements must be capable of fooling reasonable people to be material, or whether statements designed to target unreasonably credulous people are still material. *See Svete*, 556 F.3d at 1165-69 (en banc) (reversing prior decision of the Eleventh Circuit which held that objective unreliability of the misrepresentation did not satisfy the materiality test).

Fourth Circuit's decision cleanly presents a fact pattern on which this Court can settle the conflict between the circuits. This case does not involve any judgment calls about the relative importance of individual false statements, upon which reasonable people might disagree. According to the Fourth Circuit, it does not matter if Mr. Akins lied about his age out of an attempt to avoid age discrimination because any false statement is material. *Cf. United States v. Coffman*, 94 F.3d 330 (7th Cir. 1996) (distinguishing between misrepresentations that are material, as compared to those that are mere "puffery," like lying about your age). The Fourth Circuit concluded that the placement of Mr. Akins' fraudulently obtained, but authentic, social security number on the application was material simply because the information was requested and submitted. (App. 4-5).

This case frames the conflict well because if the entire paragraph that was only partially quoted by the Fourth Circuit in considered, the boilerplate explains that all the information requested in the loan application is relevant to their decision, but errors in some of the information may or may not be material to any decision. (J.A. 596) ("The undersigned acknowledge[s] and understand[s] that BB&T is relying on the information provided herein" and "if any information herein should prove to be

inaccurate or incomplete in any material respect, BB&T may [act]") *Id.* (emphasis added). In short, this passage recognizes what should have been obvious to the circuit court: the difference between relevance and materiality.

The boilerplate that the Fourth Circuit did not quote discussed inaccuracies "in any material respect," (J.A. 596), and epitomizes the difference between information that is relevant as opposed to material. The Second Circuit addressed this distinction when confronted with almost identical language in *Rigas*. *Rigas*, 490 F.3d. at 234 (boilerplate using the phrase "in all material respects"). In *Rigas* the Second Circuit concluded that the "simple fact," that certain information was required to be provided, "does not make any misstatement of that information *per se* material." *Id.* The Seventh Circuit, in a similar context, has also rejected the notion endorsed by the Fourth Circuit, that any misstatement of required information on an application is material. *United States v. Coffman*, 94 F.3d 330 (7th Cir. 1996). "A person might lie about his age on a loan application not because he thought taking two years off his actual age would make him a better loan prospect but because he didn't want anyone to find out his true age . . . . That is not the sort of lie that the false statement statutes were intended to criminalize . . .

." *Id.* at 335. This approach from the Second and Seventh Circuits fits with the common law origins of our fraud statutes, which always required a fraudulent statement to be material.

While the Fourth Circuit's decision improperly lowers the Government's burden of proof, one virtue of the decision is that it cleanly presents a fact pattern on which this Court can settle the conflict between the circuits, and confirm that a false statement is not material merely because it might be relevant to a decision-maker.[9]

### C. Granting Certiorari To Clarify What The Government Must Prove In Order To Establish Materiality Beyond A Reasonable Doubt Will Resolve Much Confusion Among The Circuits.

The differences between relevance, reliance

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[9] In most other cases where disagreement between relevance, reliance and materiality arise, it is because defendants incorrectly argue that materiality requires proof of reliance. *See infra*, Section I.C. While those cases illustrate significant misunderstandings in the district courts about the scope of materiality, the fact patterns in those cases do not provide a forum to distinguish between relevance and materiality. This case does.

and materiality seems text-book. But, as the inability to reach a consensus between the circuits illustrates, the practice of applying these terms in the context of criminal frauds has historically presented problems.

At least as early as 1940, Professor Wigmore was depicting, with some bitterness "the inaccuracy of our usage," of the terms "relevance," and "materiality," and "the harmfulness of this inadvertent error." 1 Wigmore, Evidence § 2 (3d ed. 1940). Professor Wigmore maintained that, speaking precisely, materiality is a matter of substantive law, not involving the law of evidence. *See id.* As the D.C. Circuit explained in *Weinstock*, "'Material' when used in respect to evidence is often confused with 'relevant,' but the two have wholly different meanings." *Weinstock*, 231 F.2d at 701. Unfortunately, the circuits that are now applying a tort definition from the *Restatement (Second) of Torts*, are exacerbating this confusion.

The simple rule has never been that a false statement is material merely because it involves information that is relevant to a bank's decision-making process. *See United States v. Rigas*, 490 F.3d. 208 (2d 2007). To meet its burden of proof under materiality the Government must show something more than bare relevance. *See Kenrick*, 221 F.3d at 32. The general formulation of

materiality in *Neder* meets those requirements. *Neder*, 527 U.S. at 16 ("a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it is addressed.").

The circuits that are erroneously lowering this traditional measure of materiality to the point that it is being equated with bare relevance, are either: (1) relying on footnote five in *Neder*, where the Court quotes the tort definition of materiality; or (2) falling in the trap that Justice Scalia expressed concern over in his dissent in *Neder*.

While this Court did quote the tort definition, the notion that this Court defined materiality the same as *Restatement (Second) of Torts* § 538, is an inaccurate and troublesome characterization of *Neder*. A close reading of *Neder* reveals that when this Court quoted the *Restatement's* definition in a footnote, the Court was not defining the contours of materiality by relying on contemporary sources such as the *Restatement*. To the contrary, this Court only cited the *Restatement (Second) of Torts* because *Neder* had relied on it to support his argument – a minority view among the circuits at the time – that materiality was an element of mail, wire, and bank fraud. *Neder*, 527 U.S. at 22. This Court never "adopted" the definition, but was instead repeating *Neder's* argument. If this Court had intended for the

*Restatement (Second) of Torts* to be used by the circuits to shape the core definition of criminal materiality, then the Court would have said so, and not simply appended the definition to a footnote attached to a sentence that begins: "Neder contends that . . . ." *Id.* Instead, the Court would have preceded the definition with a clear statement as the Court did earlier in the text of the Opinion of the Court, where the Court stated: "In general, a false statement is material if it has 'a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it is addressed.'"[10] *Neder*, 527 U.S. at 16.

For these reasons, the materiality analysis that has evolved in the First, Fourth, Fifth, and Eleventh Circuits, which blurs the line between relevance and materiality is questionable, and far less persuasive than the analysis in the Second and Seventh Circuits which draw directly from the line of cases like the D.C. Circuit's decision in *Weinstock*, that this Court previously endorsed in *Kungys* and

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[10] Moreover, although the bank fraud statute is of relatively new vintage, the mail fraud statute dates to 1872. The Court in *Neder* interpreted materiality as the same for mail, wire, and bank fraud. In so doing, it is unlikely the Court would rely on the *Restatement (Second) of Torts* (1976) to shape the meaning of words in statutes that date back to 1872.

*Gaudin*. *See Kungys*, 485 U.S. at 770; *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (employing same definition).

## II. NOW IS THE RIGHT TIME TO ADDRESS THIS CONFLICT BETWEEN THE CIRCUITS.

With the continuing passage of time, the conflicting approaches of the courts of appeals are diverging further. Enough time has passed since *Neder* to realize that the courts of appeals are not evolving towards a consensus on materiality. To the contrary, the circuits which have concluded that this Court did adopt the tort definition of materiality in *Neder* are increasing eroding the government's burden of proof as to this element.

Because this disagreement is rooted in misunderstandings about whether this Court endorsed one or two definitions of materiality in *Neder*, and there are significant camps on both sides of that issue, the confusion will not lift without intervention by this Court.

Although the Court had good reason to think that the correct test for materiality could be derived from *Neder*, history suggests that the materiality question is more complicated than it appears. In *Kungys*, this Court explained that:

> it had been thought that a test for materiality could be derived from certain language in *Chaunt v. United States*, 364 U.S. 350 (1960). As applied, however, this Court found that the circuits "failed to arrive at a single interpretation," of materiality, and instead attempts by the circuits to fashion a more specific mechanical test out of *Chaunt* "have not met with notable success.

*Kungys*, 485 U.S. at 770. Consequently, the Court granted certiorari in *Kungys* to resolve conflicts, and to reject the attempts to "craft a more precise test for what constitutes the "natural tendency to influence," part of the definition of materiality. *Id.*

Similarly, before *Neder*, the circuits were sharply divided on whether materiality was even an element in mail, wire, and bank fraud, with numerous circuits holding that it was not an element.[11] A grant of certiorari was required to

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[11] *See, e.g.*, *United States v. Neder*, 136 F.3d 1459 (11th Cir. 1998) (reversed by *Neder v. United States*, 527 U.S. 1 (1999) (materiality not an element); *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997) (same); *United States v. ReBrook*, 58 F.3d 961, 966 (4th Cir. 1995) (same).

resolve those circuit differences over materiality. The circuit split following *Neder* indicates that the same situation that the Court in *Kungys* addressed in the context of immigration fraud, is repeating itself in the context of mail, wire and bank frauds. Here, it is the Court's decision in *Neder* that was thought to have resolved materiality issues, but that effort has been complicated by circuit courts attempting to fashion more specific mechanical tests out of a footnote in *Neder* that is increasingly being stretched out of context. This case presents an opportunity to clarify the proper definition of materiality and direct the circuits towards a single interpretation of the Government's minimum burden of proof on this element of criminal fraud.

## CONCLUSION

For the above stated reasons, it is respectfully requested that this Court grant this Petition in order to resolve a conflict between the circuits.

Respectfully Submitted,

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No. _____

# In The Supreme Court of the United States

VINCE AKINS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

## APPENDIX

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UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

VINCE AKINS, a/k/a Vincent Akinkunmi Gbenga, a/k/a Akinkunmi Vince Olugbanga, a/k/a Vincent Akinkunmi, a/k/a Olugbenga Junior Akinkunmi,
Defendant - Appellant.

No. 07-5055

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

May 15, 2009, Argued
June 29, 2009, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Maryland, at Baltimore. (1:06-cr-00152-JFM-1). J. Frederick Motz, District Judge.

DISPOSITION: AFFIRMED.

JUDGES: Before MICHAEL, SHEDD, and AGEE, Circuit Judges.

OPINION BY: SHEDD

OPINION

SHEDD, Circuit Judge:

Vince Akins appeals from his convictions for bank fraud, arguing that the district court erred by denying his motion for judgment of acquittal. Because we conclude that substantial evidence supports Akins' convictions, we affirm.

I

A grand jury returned a nine-count indictment against Akins, but only four of those counts are relevant to this appeal and in all four he was charged with violating 18 U.S.C § 1344 by using a fraudulent social security number ("SSN") to obtain loans. In Count 6, he was charged with using the fraudulent SSN to obtain a $ 50,000 loan from Branch Banking & Trust Company ("BB&T"). He was charged in Count [*2] 7 with using the fraudulent SSN to obtain a $ 174,000 line of credit from BB&T. In Count 8, he was charged with using the fraudulent SSN to obtain a $ 25,000 credit card from BB&T. * He was charged in Count 9 with using the fraudulent SSN to obtain a credit card from American Express Corp.

* In addition to violating § 1344 by using a fraudulent SSN, each of the three counts involving BB&T alleged that Akins violated § 1344 by providing false income information. Because we find that substantial evidence relating to Akins' fraudulent SSN supports his convictions, we do not address his use of the false income information.

The jury found Akins guilty on all nine counts. He then moved for a judgment of acquittal on all counts. After denying his motion, the district court sentenced him to terms of 60 months imprisonment on each count, with all of the terms running concurrently. This appeal followed.

II

Akins argues that the district court erred in denying his motion for judgment of acquittal as to Counts 6, 7, 8 and 9. We review de novo the district court's ruling on a motion for judgment of acquittal, and we will uphold the verdict if, viewing the evidence in the light most favorable to the [*3] government, each element of the charged offense is supported by substantial evidence. United States v. Alerre, 430 F.3d 681, 693-95 (4th Cir. 2005). Substantial evidence "is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996) (en banc).

A conviction under § 1344 requires the government to prove four elements beyond a reasonable doubt: "(1) that the defendant made a false statement to a bank; (2) that he did so for the purpose of influencing the bank's action; (3) that the statement was false as to a material fact; and (4) that the defendant made the false statement knowingly." United States v. Bales, 813 F.2d 1289, 1294 n.2 (4th Cir. 1987). On appeal, Akins only challenges the sufficiency of the evidence with respect to the third element discussed above - i.e., whether his false statements were "material" to

BB&T's and American Express' lending decisions. In the context of § 1344, the Supreme Court has stated that "a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the [*4] decision of the decisionmaking body to which it was addressed." Neder v. United States, 527 U.S. 1, 16, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quotation marks omitted).

A.

Turning first to the three counts relating to BB&T, we find that substantial evidence supports a finding that Akins' false statements about his SSN were material. Regarding Count 7, which involved Akins' receipt of the $ 174,000 line of credit, the government introduced into evidence a document titled "BB&T Personal Financial Statement" (the "Statement"), which was part of Akins' application for that line of credit. The Statement, which Akins signed and which included a fraudulent SSN used by Akins, reads in part: "The information contained in this statement is provided to induce BB&T to extend or to continue the extension of credit to the undersigned . . . . The undersigned acknowledge[s] and understand[s] that BB&T is relying on the information provided herein in deciding to grant or continue credit or to accept a guaranty thereof." J.A. 596 (emphasis added). In other words, the Statement indicates that BB&T relied on the fraudulent SSN provided by Akins when it made its lending decision. Viewing this evidence in the light most favorable to the [*5] government, we find that it is sufficient to support a finding that Akins' use of the fraudulent SSN was material to the BB&T lending

decision at issue in Count 7.

The Statement also provides a basis for affirming Akins' convictions on Count 6 (the $ 50,000 BB&T loan) and Count 8 (the $ 25,000 BB&T credit card). A BB&T branch manager testified that he used the documentation associated with Akins' application for the $ 174,000 line of credit when he processed Akins' application for the $ 50,000 loan and the $ 25,000 credit card. See J.A. 112-16. Because the Statement was part of Akins' application for the $ 174,000 line of credit, we find that substantial evidence supports a finding that Akins' use of the fraudulent SSN was material to the BB&T lending decisions at issue in Counts 6 and 8.

B.

Finally, we address Akins' argument regarding Count 9. As indicated above, Count 9 charged Akins with obtaining an American Express card by using a fraudulent SSN. As part of the process of obtaining this card, Akins submitted an application to American Express in 2003. During the trial, the government offered the testimony of an American Express employee in charge of investigations. The employee's [*6] testimony indicated that when American Express approves a credit card application such as the one submitted by Akins, it does so based on an examination of the information that is provided to American Express. See J.A. 160. One piece of information Akins included in the credit card application he provided to American Express was his fraudulent SSN. See J.A. 159. Viewing this evidence in the light most favorable to the government, we find

that substantial evidence supports a finding that Akins' false statement about his SSN was material to American Express' lending decision.

## III

Based on the foregoing, we affirm the district court's judgment.

AFFIRMED